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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Steven L. Gaines, Jr.,

10 Plaintiff,

11 v.

12 Yolanda C. Stenson, *et al.*,

13 Defendants.
14

No. CV-21-01774-PHX-JJT

ORDER

15
16 At issue is Defendant United States' Motion for Reconsideration (Doc. 20), in which
17 the United States asks the Court to reconsider its Order (Doc. 19) remanding this case for
18 a failure to demonstrate the Court's subject matter jurisdiction.

19 As the Court stated in its prior Order, this case arises out of a workplace dispute
20 between two postal workers at a U.S. Postal Service facility in Phoenix. (Doc. 8 at 3-4;
21 Doc. 19.) On September 23, 2021, *pro se* Plaintiff Steven L. Gaines, Jr. filed a Petition for
22 Injunction Against Harassment in Phoenix Municipal Court. The Petition alleges that
23 Plaintiff suffered repeated instances of workplace harassment at the hands of one of his
24 supervisors, Yolanda C. Stenson, and seeks a protective order against Stenson.

25 On October 20, 2021, one day before the scheduled municipal court hearing, the
26 United States on behalf of Stenson filed a Notice of Removal in this Court pursuant to
27 28 U.S.C. § 1442. (Doc. 1.) The United States subsequently filed a Brief on Subject Matter
28 Jurisdiction (as well as a Motion to Dismiss) explaining that it had stepped into Stenson's

1 shoes as Defendant pursuant to 28 U.S.C. § 2679. (Doc. 13.) The United States’ basis for
2 removal was federal question jurisdiction. Upon removal, Plaintiff’s Petition for Injunction
3 Against Harassment became the operative Complaint in this case.

4 In its Brief, the United States contended that Plaintiff’s Petition can properly be
5 characterized as a claim that falls under the Federal Tort Claims Act (FTCA), or
6 alternatively under Title VII. (Doc. 13 at 2-4.) According to the United States’ Brief,
7 Plaintiff’s Petition not only can be characterized as an FTCA claim, but in fact must be so
8 characterized because the Federal Employees Liability Reform and Tort Compensation Act
9 of 1988 (the Westfall Act) makes the FTCA the exclusive remedy for tortious acts and
10 omissions committed by federal employees acting within the scope of their employment.
11 Furthermore, the Westfall Act makes the federal district court the exclusive venue for such
12 claims. Thus, according to the United States, because Plaintiff’s Petition sounded in tort,
13 and because Stenson was acting within the scope of her employment, Plaintiff’s state law
14 claim was an FTCA claim and removal to federal district court was required by the Westfall
15 Act. In the same Brief, the United States asked the Court to dismiss Plaintiff’s FTCA (or
16 Title VII) claim under Federal Rule of Civil Procedure 12(b)(1), because he failed to
17 exhaust administrative remedies prior to bringing his claim.

18 In its Order (Doc. 19), the Court noted that the United States removed this case
19 pursuant to 28 U.S.C. § 1442(a), but the Supreme Court has explained that section 1442(a)
20 is a “pure jurisdictional statute” that cannot independently support federal jurisdiction.
21 *Mesa v. California*, 489 U.S. 121, 136 (1989). A federal question must still be raised. *Id.*
22 The purpose of section 1442(a) is merely “to overcome the ‘well-pleaded complaint’ rule
23 which would otherwise preclude removal even if a federal defense were alleged.” *Id.*

24 The Court disagreed with the United States’ characterization that Plaintiff’s
25 municipal court Petition stated a claim falling within the ambit of the FTCA because, by
26 its own terms, the FTCA applies only to claims for money damages.

27 [T]he district courts . . . shall have exclusive jurisdiction of civil actions on
28 claims against the United States, *for money damages* . . . for injury or loss of

1 property, or personal injury or death caused by the negligent or wrongful act
2 or omission of any employee of the Government while acting within the
3 scope of his office or employment.

4 28 U.S.C. § 1346(b) (emphasis added). The Westfall Act also limits its preclusion regime
5 to suits for money damages.

6 The remedy against the United States provided by sections 1346(b) and 2672
7 of this title for injury or loss of property, or personal injury or death arising
8 or resulting from the negligent or wrongful act or omission of any employee
9 of the Government while acting within the scope of his office or employment
10 is exclusive of any other civil action or proceeding *for money damages* by
11 reason of the same subject matter against the employee whose act or
12 omission gave rise to the claim or against the estate of such employee. Any
13 other civil action or proceeding *for money damages* arising out of or relating
14 to the same subject matter against the employee or the employee's estate is
15 precluded without regard to when the act or omission occurred.

16 28 U.S.C. § 2679(b)(1) (emphasis added). Indeed, the Supreme Court has recognized that
17 a claim is “cognizable” under § 1346(b) only if it alleges six specific elements, one of
18 which is being “for money damages.” *FDIC v. Meyer*, 510 U.S. 471, 477 (1994). Because
19 Plaintiff’s Petition seeks only injunctive relief, his claim does not fall under the FTCA or
20 Westfall Act.

21 The Court also noted that the United States put forth Title VII as an alternative
22 jurisdictional basis. Under Title VII, it is unlawful for an employer “to discriminate against
23 any individual with respect to his compensation, terms, conditions, or privileges of
24 employment, because of such individual’s race, color, religion, sex, or national origin.”
25 42 U.S.C. § 2000e-2(a)(1). According to the United States, Plaintiff’s Petition should be
26 construed as a continuation of previous complaints that Plaintiff lodged with the EEOC in
27 which Plaintiff apparently complained of racial and medical discrimination. (Doc. 13 at
28 8-9.) However, Plaintiff’s Petition does not allege any harassment predicated on any
animus relating to a class protected by Title VII. Rather, Plaintiff alleges workplace
harassment of a more generic nature. While a hostile workplace can constitute a form of
racial harassment, a hostile workplace is not *ipso facto* racial discrimination when it is not
pled as such. Plaintiff’s previous dealings with the EEOC are irrelevant where his

1 complaint does not expressly or impliedly relate to them.¹ The Court thus declined to
 2 construe Plaintiff's Petition as a claim falling within Title VII.

3 Because the Court did not agree with the United States that Plaintiff's claim
 4 implicated a federal question under either the FTCA or Title VII—the only jurisdictional
 5 bases the United States proffered to substantiate its removal of this case—the Court
 6 remanded this case.

7 The United States has now filed a Motion for Reconsideration to argue a different
 8 jurisdictional basis—the Supremacy Clause. (Doc. 20 at 3 (“[T]he Supremacy Clause
 9 precludes state courts from entering or enforcing orders that interfere with the performance
 10 of federal officers.”).)

11 Motions for reconsideration should be granted only in rare circumstances.
 12 *Defenders of Wildlife v. Browner*, 909 F. Supp. 1342, 1351 (D. Ariz. 1995). A motion for
 13 reconsideration is appropriate where the district court “(1) is presented with newly
 14 discovered evidence, (2) committed clear error or the initial decision was manifestly unjust,
 15 or (3) if there is an intervening change in controlling law.” *School Dist. No. 1J, Multnomah*
 16 *Cnty. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A motion for reconsideration
 17 “may not be used to raise arguments or present evidence for the first time when they could
 18 reasonably have been raised earlier in the litigation.” *Kona Enters., Inc. v. Estate of Bishop*,
 19 229 F.3d 877, 890 (9th Cir. 2000).

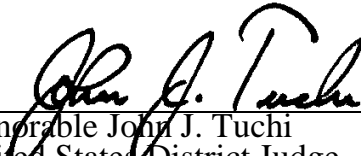
20 Here, the United States' arguments in its original Brief that Plaintiff's claim was
 21 either an FTCA or Title VII claim did not suffice to demonstrate that the Court had subject
 22 matter jurisdiction in this case. The United States, as the removing party, had the burden
 23 of establishing subject matter jurisdiction, and a failure to meet that burden must result in
 24 remand to state court. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992); *see also*
 25 28 U.S.C. § 1447(c). That the United States may now be able to demonstrate a proper basis
 26 for this Court's jurisdiction is not enough. As stated above, the United States may not use

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 28 ¹ Moreover, the previous EEOC filing referenced by the United States did not allege racial
 animus, was not directed at the same employee, and did not arise out of the same fact
 pattern. (Doc. 13-2.)

1 a Motion for Reconsideration to raise an argument for the first time that it reasonably could
2 have raised when the Court originally required a demonstration of the Court's jurisdiction
3 supporting the United States' removal of this case. Accordingly, the Court must deny the
4 Motion for Reconsideration.²

5 **IT IS THEREFORE ORDERED** denying the Motion for Reconsideration
6 (Doc. 20).

7 Dated this 14th day of June, 2022.

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9 Honorable John J. Tuchi
10 United States District Judge
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28 ² Nothing precludes the United States from raising its Supremacy Clause defense to the
municipal court's jurisdiction in municipal court.